IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,

CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

MEMORANDUM SUBMITTED AT THE REQUEST OF THE COURT

THOMAS B. FINAN
Attorney General of Maryland.

JOSEPH S. KAUFMAN,
Deputy Attorney General
of Maryland.

Suite 1201, 10 Light Street,
Baltimore 2, Maryland.

For Appellee.

The Daily Record Co., Baltimore 3, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

MEMORANDUM SUBMITTED AT THE REQUEST OF THE COURT

TO THE HONORABLE, THE JUSTICES OF SAID COURT:

This memorandum is submitted pursuant to the request of the Chief Justice at the oral argument of this cause, and is limited to the question of whether the action instituted by the Appellant becomes moot by reason of the fact that the term of office which he seeks expires on May 1, 1961.

STATEMENT OF POLICY

The Attorney General of Maryland wishes to state unequivocally that it is the desire of the State of Maryland to have the issues which are presented by this cause, and which were fully briefed and argued in this Court, determined. The issues presented are substantial and important to the public interest. It is not the desire of the Attorney General of Maryland to present any undue obstacle to the decision of this case, but he believes that a statement of the applicable law should be given to the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 13, of the Constitution of Maryland provides as follows:

> "All civil officers appointed by the Governor and Senate, shall be nominated to the Senate within fifty days from the commencement of each regular session of the Legislature; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years, (unless removed from office), and until their successors, respectively, qualify according to Law."

Article 68, Section 1, Annotated Code of Maryland (1960 Supplement) provides as follows:

> "The Governor on the approval of the application by the Senator of the county or legislative district of Baltimore City in which the applicant resides, shall appoint and commission in his discretion and judgment any number of persons, male or female, of known good character, and integrity and abilities, citizens of the United States, and who have resided in this State two (2) years previous to their appointment

as notaries public for the State of Maryland; provided that such residence requirement shall not be applicable to persons appointed as an official court reporter by any court of Baltimore City.

"No distinction shall be made between male or female applicants, who shall take the oath of office before the clerk of the circuit court for each of the counties in the State, and the clerk of the Superior Court in Baltimore City, respectively, and shall receive a commission signed by the Governor and Secretary of State under the great seal of the State. They shall pay the sum of five ($5) dollars for each commission so issued, to the treasury of the State of Maryland, and the further sum of fifty cents (50¢) to the clerk for the registration of the name and address of each of the said notaries public."

STATEMENT OF FACTS

The Appellant in proper form made application for the office of Notary Public in and for Montgomery County, State of Maryland. The application was properly endorsed by the Honorable Edward S. Northrop, State Senator from Montgomery County, Maryland, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor signed, and the Secretary of the State of Maryland attested, a commission to the Appellant as a Notary Public in and for Montgomery County, State of Maryland. According to the commission docket of the Circuit Court of Montgomery County (Page 128), the commission was received by the clerk on June 23, 1959. The docket further shows that the Appellant "refused to qualify because he did not believe in God", and the commission was thereupon returned to the Secretary of State of Maryland on July 28, 1959, and was destroyed. A specimen of the commission is attached hereto and prayed to be made a part hereof. It clearly appears from the speci-

men commission that the terms of office of the Notaries Public expire May 1, 1961.

The Appellant in his petition for a writ of mandamus prays as follows:

> "1. That a Writ of Mandamus be issued, directed to Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, State of Maryland, commanding him to perform his duties as Clerk of said Court and render to your petitioner the Oath or affirmation as set forth in Article I Section 6 of the Constitution of the State of Maryland and upon your petitioner's swearing or affirming thereof, the said Clerk be further commanded to issue to your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland."

The Attorney General of Maryland has been advised by the Honorable Edward S. Northrop, State Senator from Montgomery County, Maryland, that the Appellant has requested to be reappointed, and that Senator Northrop has further advised that he has certified and forwarded to the Governor the name of the Appellant for appointment as a Notary Public for a term commencing on May 1, 1961, and ending on the first Monday of May, 1963. The Governor of Maryland, after having been apprised of these proceedings and the question that the issues presented may possibly be moot, has advised the Attorney General that, in order to keep these proceedings in their present status, he, the Governor of Maryland, will in due course issue another commission to the Appellant as a Notary Public.

STATEMENT OF THE LAW

In *State of Tennessee, ex rel. Maloney v. Condon*, 189 U.S. 64, a writ of error to review the judgment of the Supreme Court of Tennessee, which affirmed decrees of

the Chancellor and the Court of Chancery Appeals dismissing a bill in an action for usurpation of office, was dismissed on the ground that the terms of office of the relators originally elected by the county court and of the defendants had expired. It was alleged by the persons superseded in public office by an act of the General Assembly that the act was unconstitutional. This Court said:

> "If we were to hold that the act could be subjected to the test of the 14th Amendment, and that it could not stand that test, we should do nothing more than reverse the decree below and remand the cause, and, as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject.
>
> " 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.' Mr. Justice Gray, *Mills v. Green*, 159 U.S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 133."

It was held that the writ of error came within the rule above quoted and it was therefore dismissed.

See also *Shaffer v. Howard*, 249 U.S. 200, where an appeal from a decree refusing to enjoin a state auditor and a county sheriff from enforcing a tax levied under the law of Oklahoma on the ground of the repugnancy of such tax to the Constitution of the United States, and where the

terms of office of the defendant officials had expired and their successors had qualified but there was no law in Oklahoma authorizing a revival or continuance of the cause of action against such successors, was dismissed (249 U.S. 201). This Court said that:

> "* * * it follows that the controversy has become merely moot, and that we have no authority to further consider or dispose of it."

The decree below was reversed and the cause remanded with directions to dismiss the bill for want of proper parties.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

JOSEPH S. KAUFMAN,
Deputy Attorney General
of Maryland,

For Appellee.

SUPREME COURT OF THE UNITED STATES

No. 373.—October Term, 1960.

Roy R. Torcaso, Appellant, v. Clayton K. Watkins, Clerk of the Circuit Court for Montgomery County, Maryland. } On Appeal from the Court of Appeals of Maryland.

[June 19, 1961.]

Mr. Justice Black delivered the opinion of the Court.

Article 37 of the Declaration of Rights of the Maryland Constitution provides:

> "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ."

The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. He then brought this action in a Maryland Circuit Court to compel issuance of his commission, charging that the State's requirement that he declare this belief violated "the First and Fourteenth Amendments to the Constitution of the United States . . . ."[1] The Circuit Court rejected these federal constitutional contentions, and the highest court of

[1] Appellant also claimed that the State's test oath requirement violates the provision of Art. VI of the Federal Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal offices.

the State, the Court of Appeals, affirmed,[2] holding that the state constitutional provision is self-executing and requires declaration of belief in God as a qualification for office without need for implementing legislation. The case is therefore properly here on appeal under 28 U. S. C. § 1257 (2).

There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public "office of profit or trust" in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in "the existence of God." It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical "establishment" of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers.[3]

---

[2] 223 Md. 49, 162 A. 2d 438. Appellant's alternative contention that this test violates the Maryland Constitution also was rejected by the state courts.

[3] See, *e. g.*, I Stokes, Church and State in the United States, 358–446. See also cases cited, note 7, *infra*.

There were, however, wise and far-seeing men in the Colonies—too many to mention—who spoke out against test oaths and all the philosophy of intolerance behind them. One of these, it so happens, was George Calvert (the first Lord Baltimore), who took a most important part in the original establishment of the Colony of Maryland. He was a Catholic and had, for this reason, felt compelled by his conscience to refuse to take the Oath of Supremacy in England at the cost of resigning from high governmental office. He again refused to take that oath when it was demanded by the Council of the Colony of Virginia, and as a result he was denied settlement in that Colony.[4] A recent historian of the early period of Maryland's life has said that it was Calvert's hope and purpose to establish in Maryland a colonial government free from the religious persecutions he had known—one "securely beyond the reach of oaths . . . ."[5]

---

[4] The letter from the Virginia Council to the King's Privy Council is quoted in Hanley, Their Rights and Liberties (Newman Press 1959), 65, as follows:

"According to the instructions from your Lordship and the usual course held in this place, we tendered the oaths of supremacy and allegiance to his Lordship [;] [Baltimore] and some of his followers, who making profession of the Romish Religion, utterly refused to take the same. . . . His Lordship then offered to take this oath, a copy whereof is included . . . but we could not imagine that so much latitude was left for us to decline from the prescribed form, so strictly exacted and so well justified and defended by the pen of our late sovereign, Lord King James of happy memory . . . . Among the many blessings and favors for which we are bound to bless God . . . there is none whereby it hath been made more happy than in the freedom of our Religion . . . and that no papists have been suffered to settle their abode amongst us. . . ."

Of course this was long before Madison's great Memorial and Remonstrance and the enactment of the famous Virginia Bill for Religious Liberty, discussed in our opinion in *Everson* v. *Board of Education*, 330 U. S. 1, 11–13.

[5] Hanley, *op. cit., supra*, p. 65.

When our Constitution was adopted, the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article VI of that document of a provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Article VI supports the accuracy of our observation in *Girouard* v. *United States*, 328 U. S. 61, 69, that "[t]he test oath is abhorrent to our tradition." Not satisfied, however, with Article VI and other guarantees in the original Constitution, the First Congress proposed and the states very shortly thereafter adopted our Bill of Rights, including the First Amendment.[6] That Amendment broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly. Since prior cases in this Court have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects, we need not cover that ground again.[7] What was said in our prior cases we think controls our decision here.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304, we said:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion

[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[7] See, *e. g.*, the opinions of the Court and also the concurring and dissenting opinions in *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Cantwell* v. *Connecticut*, 310 U. S. 296; *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624; *Fowler* v. *Rhode Island*, 345 U. S. 67; *Everson* v. *Board of Education*, 330 U. S. 1; *Illinois ex rel McCollum* v. *Board of Education*, 333 U. S. 203; *McGowan* v. *Maryland*, — U. S. —.

or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . . Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

Later we decided *Everson* v. *Board of Education*, 330 U. S. 1, and said this at pages 15 and 16:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

While there were strong dissents in the *Everson* case, they did not challenge the Court's interpretation of the First Amendment's coverage as being too broad, but thought the Court was applying that interpretation too narrowly to the facts of that case. Not long afterward in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S.

203, we were urged to repudiate as dicta the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage. We declined to do this, but instead strongly reaffirmed what had been said in *Everson*, calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the *Everson* opinion. And a concurring opinion in *McCollum*, written by MR. JUSTICE FRANKFURTER and joined by the other *Everson* dissenters, said this:

> "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' . . . We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' " *

The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach* v. *Clauson*, 343 U. S. 306, had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum*. But the Court's opinion in *Zorach* specifically stated: "We follow the *McCollum* case." 343 U. S., at 315. Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionality discredited policy of probing religious beliefs by test

---

* 333 U. S., at 213, 232. Later, in *Zorach* v. *Clauson*, 343 U. S. 306, 322, MR. JUSTICE FRANKFURTER stated in dissent that "[t]he result in the McCollum case . . . was based on principles that received unanimous acceptance by this Court, barring only a single vote."

oaths or limiting public offices to persons who have, or perhaps more properly, profess to have a belief in some particular kind of religious concept.[9]

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers,[10] and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[11]

---

[9] In one of his famous letters of "a Landholder," published in December 1787, Oliver Ellsworth, a member of the Federal Constitutional Convention and later Chief Justice of this Court, included among his strong arguments against religious test oaths the following statement:

"In short, test-laws are utterly ineffectual: they are no security at all: because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences. . . ." Quoted in Ford, Essays on the Constitution of the United States, 170. See also 4 Elliot Debates in the Several State Conventions on the Adoption of the Federal Constitution, 193.

[10] In discussing Article VI in the debate of the North Carolina Convention on the adoption of the Federal Constitution, James Iredell, later a Justice of this Court, said:

". . . [I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?"

And another delegate pointed out that Article VI "leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." 4 Elliott, *op. cit., supra*, at 194, 200.

[11] Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism,

In upholding the State's religious test for public office the highest court of Maryland said:

> "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."

The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U. S. 183. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "'. . . that no federal employee shall attend Mass or take any active part in missionary work.'" [12]

This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.

The judgment of the Supreme Court of Maryland is accordingly reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN concur in the result.

Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda*, 153 C. A. 2d 673, 315 P. 2d 394; II Encyclopaedia of the Social Sciences 293; 4 Encyclopaedia Britannica (1957 ed.) 325–327; 21 *id.*, at 797; Archer, Faiths Men Live By (2d ed. revised by Purinton), 120–138, 254–313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47.

[12] 344 U. S., at 191–192, quoting from *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.